

# PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

PACE UNIVERSITY SCHOOL OF LAW

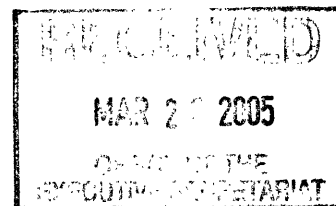
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Stephen L. Johnson  
Acting Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

March 15, 2005

Re: Riverkeeper, Inc. v. Mirant Lovett, LLC

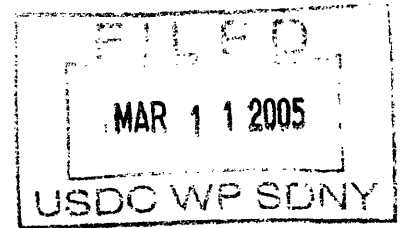
Please find enclosed a copy of the complaint filed in the Southern District of New York in the above named proceeding.

Sincerely,

Susan Marriott  
Legal Intern



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
RIVERKEEPER, INC.,

Plaintiff,

v.

MIRANT LOVETT, LLC, as owners and  
operators of the Lovett Generating Station,

Defendant.  
-----X

CIVIL ACTION

No. \_\_\_\_\_

COMPLAINT

**05 CIV. 2792**

**INTRODUCTION**

1. This action is a "citizen suit" brought under Section 505(a)(1) of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (hereinafter "Clean Water Act" or "CWA"), seeking relief from defendants' violations of the terms and provisions of the Clean Water Act.
2. Plaintiffs seek civil penalties payable to the United States Treasury, injunctive relief, declaratory relief, and costs including reasonable attorney's fees.

**JURISDICTION**

3. This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), and federal question jurisdiction, 28 U.S.C. § 1331.
4. On March 30, 2004, plaintiffs gave notice of the violations and plaintiffs' intent to file suit against defendant to the Commissioner of the New York State Department of

Environmental Conservation; the Regional Director of the New York State Department of Environmental Conservation, Region III; the Attorney General of the United States; the Administrator of the United States Environmental Protection Agency; the Regional Administrator of the United States Environmental Protection Agency, Region II; and to the defendants pursuant to CWA § 505(b)(1), 33 U.S.C. § 1365(b)(1). A copy of this notice is attached as Exhibit A.

5. More than sixty days have passed since this notice was served upon defendants and the aforementioned governmental entities satisfying CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A).
6. Neither the New York State Department of Environmental Conservation nor the United States Environmental Protection Agency commenced or diligently prosecuted a court action to redress the violations as per CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

#### VENUE

7. Venue is appropriate in the Southern District of New York pursuant to CWA § 505(c)(1), 33 U.S.C. § 1365(c)(1) because the source of the violations is located within this district.

#### PARTIES

8. Riverkeeper, Inc. (hereinafter "Riverkeeper"), is a non-profit corporation organized under the laws of the State of New York with its principal place of business at 25 Wing & Wing, Garrison, NY, 10524-0131. Riverkeeper's mission is to conserve and enhance the biological integrity of the Hudson River and its tributaries and to protect the Hudson River's natural resources. Most of Riverkeeper's 5,000 members live on or near the

Hudson River and enjoy the Hudson River for a number of activities, including, but not limited to, fishing and boating, swimming, drinking water, and hiking. Riverkeeper's members share a common concern about the quality of the Hudson River and its surroundings.

9. Plaintiff is a "citizen" within the meaning of the citizen suit provisions of the CWA § 505(a), 33 U.S.C. § 1365(a).
10. The quality of the Hudson River and its surrounding areas directly affects the health, recreational, aesthetic, commercial, and environmental interests of Riverkeeper's members. The interests of Riverkeeper's members are being, and will be, adversely affected by defendants' failure to comply with the requirements of the Clean Water Act.
11. Defendant Mirant Lovett, LLC is the owner and operator of the Mirant Lovett Power Generating Station (hereinafter "Generating Station") which is a limited liability company that exists pursuant to the laws of New York State with offices at 37 Elm Street, Tomkins Cove, NY, 10986. Mirant Lovett, LLC is responsible for complying with the provisions of the Clean Water Act in the Generating Station's daily operations.
12. Defendant is a "person" with the meaning of CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

#### **GENERAL ALLEGATIONS**

13. Congress enacted the Clean Water Act in 1972 for the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. One of the specific goals of the Act was "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . . be achieved by July 1, 1983." Id.

14. Under CWA §§ 402(a) and (b), 33 U.S.C. §§ 1342 (a) and (b), the Administrator of the EPA has authorized the DEC to implement a NPDES permitting program in New York, the State Pollution Discharge Elimination System Permit Program (SPDES). This program seeks to regulate discharges of pollutants into navigable waters, defined as waters of the United States in CWA § 502(7), 33 U.S.C. § 1362(7). Discharges of pollutants into navigable waters without a permit are prohibited by CWA § 301(a), 33 U.S.C. § 1311(a).
15. The defendant has been issued SPDES permit No. NY-0005711, which authorizes the Generating Station to discharge limited quantities of pollutants, including heat, into the Hudson River under certain conditions and limitations.
16. Waters of the United States within the meaning of the Clean Water Act include any navigable waters or waters that are tributaries to navigable waters. 33 U.S.C. § 1362(7).
17. The Hudson River and its tributaries are waters of the United States within the meaning of the Clean Water Act.
18. Clean Water Act § 316(b), 33 U.S.C. § 1326(b), requires that the best technology available be used to minimize any adverse environmental impacts that may occur due to the location, design, construction, or capacity of cooling water intake structures in any permit authorizing the discharge of heat pollution.

**VIOLATIONS OF THE CLEAN WATER ACT BY SPECIFIC VIOLATIONS OF THE**  
**SPDES DISCHARGE PERMIT NUMBER NY-0005711**

19. Defendant owns and operates a power generating station in the Town of Tomkins Cove, Rockland County, New York. The Generating Station utilizes cooling water intake structures under the conditions and limitations of SPDES permit No. NY-0005711.
20. The permit calls for the implementation of The Gunderboom® Marine Life Exclusion System™ (hereinafter "MLEST™") and for monitoring of the Exclusion Rate of aquatic organisms to minimize adverse environmental impacts pursuant to CWA § 316(b), 33 U.S.C. § 1326(b). Defendants have consistently delayed in implementing the MLEST™ as well as monitoring the Exclusion Rate as required by their permit.
21. Clause 10.A of Part I of SPDES Discharge Permit number NY-0005711 requires defendant to annually implement the MLEST™ around its cooling water intake structures of units 3, 4, and 5 of the Generating Station on February 23<sup>rd</sup> or when ice conditions on the Hudson River allow for safe deployment, whichever is later.
22. Defendant has not implemented the MLEST™ around its cooling water intake structures of units 3, 4, and 5 of the Generating Station as described in "21" to date this year.
23. In the prior year, 2004, the MLEST™ was not implemented around its cooling water intake structures of units 3, 4, and 5 of the Generating Station until April 30.
24. Ice conditions in the Hudson River have permitted safe deployment on February 23, 2004 and February 23, 2005.
25. Paragraph 2.2.1 Ichthyoplankton Monitoring Program of the Biological Monitoring Program of SPDES Discharge Permit number NY-0005711 requires defendant to monitor weekly until April 15<sup>th</sup>, twice weekly from April 15<sup>th</sup> through August 31<sup>st</sup>, and biweekly from September 1<sup>st</sup> through October 15<sup>th</sup>.
26. Defendant has not conducted any of the monitoring described in "25" to date this year.

27. In 2004, monitoring was not conducted until the MLEST<sup>TM</sup> was implemented on April 30.

### **CONTINUING VIOLATIONS**

28. As of the date of the filing of this complaint, all of the violations complained of in the March 30, 2004 notice letter are continuing or are reasonably likely to continue.

### **CLAIM FOR RELIEF**

29. Defendant's violations described in paragraphs 19-27 are illegal permit violations within the meaning of CWA § 402, 33 U.S.C. § 1342.
30. Each of Defendant's permit violations identified in paragraphs "22," "23," "26," and "27," and each of their continuing violations is a separate violation of CWA § 301(a), 33 U.S.C. § 1311(a), for each day on which it occurred.
31. All conditions precedent to this suit have been satisfied.

### **REQUEST FOR RELIEF**

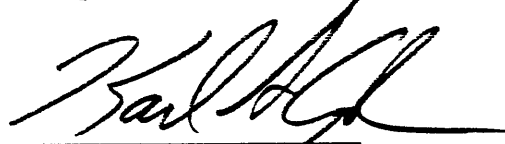
WHEREFORE, the plaintiffs respectfully request the Court grant the following relief:

1. Declare defendant to have violated, and to be in violation of CWA § 301, 33 U.S.C. §1311.
2. Enjoin defendant from operating the Mirant Lovett Power Generating Station in such a manner as will result in the further violations of CWA § 301(a), 33 U.S.C. § 1311(a) and require defendant to take such measures as are necessary to bring the Generating Station into compliance with the Clean Water Act.

3. Award civil penalties in the amount of \$32,500 per day of violation, as authorized by CWA § 309(d), 33 U.S.C. § 1319(d).
4. Award plaintiffs their costs, including reasonable attorney, witness and consultant fees, as authorized by CWA § 505(d), 33 U.S.C. § 1365(d); and
5. Award such other relief as this Court deems just and proper.

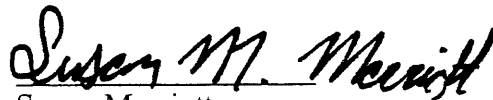
Dated: February 16, 2005  
White Plains, New York

Respectfully Submitted,



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Attorney for Plaintiffs



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